

## **MAINE MS4 GENERAL PERMIT RESPONSE TO COMMENTS**

This document is organized by the major sections ("Parts") of the Maine Municipal Separate Storm Sewer System General Permits for Small MS4s, MDOT and MTA MS4s, and State or Federal MS4s. When a comment did not specify the part of the MS4GP being addressed, the comment has been included under the Part that appeared most applicable. A section including general comments appears at the end of the comments. In some cases, the same or closely related comments from more than one person have been summarized in a single comment section. In some cases, comments addressed possible statutory changes or other issues outside the scope of this general permit. This document does not respond to those comments.

The Department also identified some clarifications that were necessary, based upon questions received. These appear at the end of the document. Minor changes in numbering and format are not described.

"Department" or "DEP" refers to the Maine Department of Environmental Protection. "EPA" refers to the federal Environmental Protection Agency. "MS4GP" refers to the three General Permits to discharge stormwater from: Small Municipal Separate Storm Sewer Systems, Maine Department of Transportation and Maine Turnpike Authority Municipal Separate Storm Sewer Systems, and State or Federally Owned Municipal Separate Storm Sewer Systems,.

The Department had made both "Construction" and "MS4" general permits available for public comment at the same time. In some cases, it was not clear to which permit a comment was directed. In these cases, the Department has attempted to address the comment in the context of both types of permits.

The Maine Attorney General's Office reviewed the MS4GPs for legal sufficiency, and EPA reviewed the MS4GPs for conformance with federal requirements. The Attorney General's Office requested some minor changes, which have been made. EPA required changes which have been made, and are indicated by "EPA".

This document does not describe minor formatting and numbering changes, or changes to headings. A copy of the public comment draft, showing changes made in underline/strike, appears at the end of this document.

### **PART I -- General Permit Coverage**

**Comment.** Part I (A)(2) of the draft Small MS4 GP provides that the Maine Department of Environmental Protection (the "Department") may grant a waiver from permitting under the following conditions: (a) the MS4 is located in an urbanized area with a population of less than 1,000; (b) stormwater from the MS4 is not causing the impairment of a receiving water body; and (c) the MS4 does not contribute substantially to the pollutant load of a physically interconnected MS4. This provision is absent from the draft MDOT/MTA MS4 GP. The omission is surprising, since the conditions supporting a waiver determination potentially exist within MDOT/MTA MS4 systems. (12).

MTA stormwater conveyances may be located within a waived area of small MS4, and unless the waiver extends to MTA as well, there exists the possibility that MTA could have

compliance obligations within portions of a municipality that has received a waiver. (The same would be true for MDOT.) It should be made clear in all MS4 permits that if the Department grants a waiver to an MS4, the waiver applies to all MS4s located within the waived MS4 area. At minimum, the waiver provision should be included in the final MDOT/MTA MS4 GP. (17)

**Response.** If the Department grants a waiver to a municipality for an MS4, the waiver may apply to other MS4s located within the waived area. A Person operating an MS4 may request a waiver based on the above mentioned criteria.

**Comment. Part I (D) (Limitations on Coverage)**

Section D provides that once the Department notifies a permittee that it requires an individual permit “no work may be begun or continued unless and until the individual permit is obtained.” In the context of the CGP, perhaps this requirement makes some sense. However, it is difficult to understand what this would mean in the context of the MDOT/MTA MS4 GP (or any of the other regulated small MS4 general permits). It is unclear what “work” would have to stop. MTA cannot shut down its roadways in the event that DEP determines that an individual permit may be necessary and, even if that could be done, such roadways would not cease to convey stormwater. In addition to being illogical, this provision is also unnecessary, as the Memorandum of Agreement between MTA and the Department governs MTA construction projects. Further, this provision conflicts with Standard Condition O, which provides that this permit is terminated when an individual permit becomes effective (12, 14, 17)

**Response.** . The provision has been deleted.

**Comment. Part I (D)(7) (Waste Discharge License)**

Part I (D)(7) observes that a waste discharge license may be required pursuant to Chapter 543. It is redundant because the requirement to obtain a waste discharge license is already noted in Part I (D)(6). Therefore, this section should be deleted.

At minimum the definitions recited in the second paragraph should be deleted because they are not supported by citations to any Maine regulation, and do not appear, at least as written, in Chapter 543.

**Response.** This section was included to add clarification of when an individual permit is required. No change has been made. Class five wells are covered in Chapter 543 see Section 4(B).

**Comment. Part I (D)( 4) (Total Maximum Daily Load (TMDL)); and Part IV (K) (Total Maximum Daily Load (TMDL))**

Part I (D)( 4) provides that the permit does not authorize point source discharges that are “*inconsistent*” with any EPA-approved TMDL for the waterbody into which the point source drains, or that are to “impaired” waterbodies for which the Department has issued a “watershed-specific” MS4 general permit. Part IV (K) further provides that a discharge to an “impaired” waterbody with an “EPA approved TMDL” must be “*consistent*” with the TMDL.

These provisions present the following issues:

- The permit does not define “impaired waterbody,” so it is unclear what the scope of the limitation on authorization may be. MTA understands that the broad definition of “impaired

waters” given in the draft CGP raises significant issues with regard to due process, and, potentially, takings, that are the subject of comment on the draft CGP to be provided by others. MTA shares in those concerns.

- The Department has not issued, nor has it proposed to issue, a “watershed-specific” general permit. The Department has stated that it seeks to avoid having to amend its MS4 permits and the Construction GP in the event that it issues a watershed-specific general permit in the future, but it is far from clear that by attempting to identify a non-existent future general permit that this dubious goal is accomplished. References to undefined future permitting schemes should be deleted from this permit.(12, 5)
- It is unclear what otherwise-permitted discharges may be “inconsistent” with an EPA-approved TMDL or what permittees must demonstrate to show that their discharges are “consistent” (or not “inconsistent”) with future TMDLs.

TMDLs are defined in 40 CFR Section 130.2 as the sum of the individual (a) waste load (point source) allocations (“WLAs”) and (b) load (non-point source) allocations and natural background (“LAs”). Pursuant to Chapter 529(2)(a)(2)(i), general permits, including all three MS4 permits and the CGP, can regulate only stormwater point sources. Therefore, these permits, by definition, cannot authorize discharges inconsistent with a TMDL, unless the TMDL contains a waste load allocation. The language in these sections is overly broad since it requires consistency with all EPA-approved TMDLs, even those where there is no WLA. The TMDL sections should be revised to require consistency only with EPA approved TMDL waste load allocations. (12, 14)

**Comment Part I.D. (4)** Total maximum daily load (TMDL). The current language doesn’t fit into the context of this MS4 permit. This permit is for point discharges from pipes that already exist underground (for the most part). First, this permit should only address EPA approved TMDLs with wasteload allocations (as in the federal permits). Second, while there is some logic in requiring a plan to address point source allocations consistent with a TMDL, it makes no sense to say the permit becomes invalid if a TMDL is established. This is not a simple matter of an industrial facility having the ability to switch a valve off or controlling its own discharges. For the most part, illegal discharges to an MS4 are from off site, and there are no valves or culvert plugs. It makes no sense to say that no work may be continued unless an individual permit is obtained. These are functioning systems necessary for infrastructure drainage and safety. A time frame for implementation of a plan that seeks to meet the wasteload allocation seem reasonable (Part IV.K), and the General Permit should remain valid until it expires. Thirdly, reference to an impaired waterbody with a watershed-specific MS4 general permit is unclear. There is already so much confusion that has been created by these NPDESII permits, it seems inappropriate for DEP to be mentioning permits that don’t exist. This non-existent permit offers no relief to the problems created by coverage limitations discussed above. Watershed specific permits should be saved for discussion in the next phase of NPDESII/stormwater implementation. “Impaired waterbody” isn’t defined in this permit, so it’s unclear what standards they may require.(14, 17)

**Response.** A definition of impaired waterbody has been added to the permit. The MS4GP relies upon the 303(d) list. The 303(d) list is determined by the EPA, and issuance of the 303(d) list is pursuant to EPA requirements and guidelines. This list is issued on a biennial basis and is subject to public comment and EPA approval. The Department may issue a watershed specific general permit as an alternative to issuing an individual permit for stormwater discharges.

The Department staff agrees that it is only “waste load allocations”(WLAs) that a discharge must be consistent with, and so have added this language, as well as a requirement that a discharge be in compliance with any TMDL implementation plan.

40 CFR § 122.34(e)(1) states “the permittee” you must comply with any more stringent effluent limitations in your permit, including permit requirements that modify, or are in addition to, the minimum control measures based on an approved TMDL or equivalent analysis.

The Department allows for a three tier approach for a regulated small MS4 to deal with TMDLs

If a TMDL is approved or modified by EPA subsequent to the effective date of this general permit, the Department shall notify the permittee and may require any of the following.:

1. Require the permittee to review its plan for consistency with the TMDL, and propose any necessary modification to the plan to the Department within six months of the receipt of notification concerning the TMDL;
2. Issue a watershed-specific general permit for the area draining to the impaired waterbody. If such a watershed-specific general permit is issued, the Department will modify this general permit pursuant to 38 M.R.S.A. § 414-A(5) for purposes of activities otherwise regulated under this general permit. The watershed-specific MS4 general permit may reference parts of this general permit.
3. Require an individual permit.

**Comment Part I.D. (5)** Violation of water quality standards. There is no grace period before a permittee is considered out of compliance. Need language pursuant to Part IV.K. (14, 17)

**Response** This general permit does not authorize a discharge that may cause or contribute to a violation of a water quality standard. If the Department finds that the permittee has a discharge that may cause or contribute to a water quality violation the permittee is responsible for resolving the violation.

## **PART II -- Definitions**

The term "routine" should be deleted from the definition of "maintenance". It does not add to the definition and is confusing in that it is susceptible to variable interpretation. (12, 17)

**Response.** The approach taken to routine maintenance in the draft is consistent with that used for many years by the Department under both the Site Law and the Stormwater Management Law.

It is possible that some non-impervious area may need to be maintained and should therefore also be exempted. For example, a buffer or ditch lining may need to be repaired. Therefore, the changes indicated effectively expand the exemption for routine maintenance.

"Disturbed area" does not include routine maintenance but does include redevelopment.  
"Routine maintenance" is maintenance performed to maintain the original line and grade, hydraulic capacity, and original purpose of the facility.

**Comment. Part II Total Maximum Daily Load (TMDL).** Should read: “Total Maximum Daily Load” or “TMDL” means the maximum capacity of a surface water to assimilate a pollutant as established by the Department, in accordance with all applicable DEP and EPA rules and procedures for establishing such capacity, including pollutants contributed by point and non-point sources and a margin of safety. *Whose comment?*

**Response** The definition of TMDL has been amended to include the following language: “. . . and approved by the U.S. Environmental Protection Agency (“EPA”), consistent with conditions set forth in 40 CFR Part 130 . . .”

### **PART III – Requirements** *Part III is “Procedure”*

**Comment. Part III (C) (1) (Contents of NOI –Part A).** Subsection (d) of Part III (C) (1) requires the permittee to submit maps indicating the roads and drainage ways the permittee is responsible for within the urbanized area as part of the Part A NOI due on March 10, 2003. This goes significantly beyond the federal NOI requirements found at 40 CFR Section 122.34. Development of maps showing the waterbodies into which MS4 outfalls drain is part of the minimum control measures to be implemented over a five-year period under the terms of the permit. As a practical matter, while MTA has maps of its roadways (and would be willing to provide these voluntarily with its Part A NOI), MTA is unlikely to be able to develop maps that identify drainage ways by the March 10, 2003 deadline. A delay in the receipt of UA maps has only exacerbated this problem.

It is notable that the Department is not imposing this requirement on permittees under the Small MS4 GP. There is no logical basis to require maps of MTA in the NOI when they are not required in other small MS4s’ NOIs.(12).

MTA does not object to providing the names of the municipalities, receiving streams and waterbodies into which it discharges in the Part A NOI, although this, too, goes beyond the requirements of federal regulations. (17)

**Response.** The Department needs to know who is responsible for each road system, who is the owner or who is the operator. The Department is requiring maps or a written description from MDOT & MTA so it can evaluate which regulated small MS4 is responsible for road systems within the UA. The goal is not to have every road system in the UA described or submitted on a map; the goal is to make an initial cut to determine who is responsible for or operates systems within the UA. Once it is confirmed which systems are the responsibility of MDOT and MTA the Department will assume that the municipality will be responsible for the remaining systems. There may be further negotiations among these entities where these systems interface. This requirement should facilitate a dialog among MDOT, MTA, federal state, county and regulated small MS4s.

**Comment. Part III (C) (2) (Contents of the NOI – Part B).** Subsection (b) (ii) of Part III (C) (2) requires the permittee to provide with Part B of the NOI, the names and position of each person with responsibility for implementing each BMP. This goes beyond the federal requirements for NOIs, which provide only that the name of the person coordinating the storm water program must be supplied. This level of specificity is unnecessary and in many instances impossible, since MTA will not have identified all such individuals by May 23, 2003. This requirement is pointless, since the names are likely to change over time, especially in the early development of the program. This requirement should be deleted from the permit. (17)

**Response.** The Department is no longer requiring a two part NOI submission. The Department staff needs to know with as much specificity as feasible who will be responsible for implementing BMPs. If DEP's Stormwater Coordinator has a question from a permittee regarding a specific BMP there should be clear delineation on who shall address the permittee's question. The Department realizes that as the Plan developments there will be some shifting of staff. The NOI requirement has been changed from the names and position of each person with responsibility for implementing each BMP to the person(s) or position(s) responsible for implementing each BMP.

#### **PART IV -- Procedure**

**Comment. Part IV.D.3:** The permit should include the following authorized non-stormwater discharges that are allowed under 40 CFR Part 122.34(b)(3)(iii):

- "water line flushings";
- "residential building wash waters, without detergents";
- "individual resident car washing"; and
- "dechlorinated swimming pool discharges".

The "discharges from potable water sources" has been limited substantially. The limitations should be deleted to be consistent with the federal regulation. Many of these issues can be addressed by the MS4 through the Public Education and Outreach Minimum Measure. By specifically not listing them as allowable non-stormwater discharges, the MS4s will need to detect and eliminate them. (8)

**Response.** The permit has been changed to reflect authorized non-stormwater discharges that are allowed under 40 CFR Part 122.34(b)(3)(iii). However, residential building wash waters, without detergents is not listed in 40 CFR Part 122.34(b)(3)(iii) and has not been added to the list.

**Comment. 2. Part IV.A:** To be consistent with 40 CFR Part 122.34(a), a comma should be inserted between "maximum extent practical" and "to protect water quality". (8).

**Response.** This change has been made.

**Comment. 3. Part IV.D.1.a.iii:** I recommend deleting "and ultimately at changing behaviors" since many existing behaviors are positive ones that we would not want to change but reinforce. (8).

**Response.** The intent is to only change behaviors such that they benefit stormwater quality and quantity. The phrase remains.

**Comment. 4. Part IV.D.3.a.iv:** I recommend changing "non-stormwater discharges" to "illicit discharges". The permit should not require detection and elimination of allowable non-stormwater discharges. (8).

**Response.** This portion of the permit will remain consistent with 40 CFR Part 122.34(b)(3)(iii), the phrase non-stormwater discharges-- remains.

**Comment. 5. Part IV.A.6.a.iii - v:** These three requirements are not required by EPA under 40 CFR Part 122.34(b)(6). I recommend listing them as suggested items. (8).

Develop and implement a program to sweep all publicly accepted paved streets and publicly owned paved parking lots at least once a year as soon as possible after snowmelt;

- ii. Develop and implement a program to evaluate and, if necessary, clean catch basins and other stormwater structures that accumulate sediment at least once a year and dispose of the removed sediments in accordance with current state law; and
- iii. Develop and implement a program to evaluate and, if necessary, prioritize for repairing, retrofitting or upgrading the conveyances, structures and outfalls of the MS4.

**Response.** These requirements were developed through an extensive stakeholder process in which sand and sediment removal as well as system maintenance were identified as an important means as reducing the pollutants in stormwater runoff. They will remain in the permit.

**Comment. 6. Part VI.I.2:** I recommend changing all the "should be" to "may be". I also recommend changing the description of the monitoring approach to be more flexible. The monitoring approach should be based on the specific information of the stormwater flow such as pollution sources. (8)

Part IV (I)(2) (Evaluation and Assessment – Suggested Monitoring)

This subsection "suggests" that permittees undertake an analytical monitoring program beginning in 2004. The program entails monitoring for a large number of parameters. There is no stated basis for the selection of these parameters.

Part IV (I)(2) should be deleted in its entirety. It is confusing to include "suggested" requirements in a permit. Even though the subsection is entitled "suggested monitoring," the potential for confusion exists, particularly in light of Standard Condition F (Sampling and test procedures) and Standard Condition G (Monitoring requirements), which, individually and taken together, imply that the permit requires analytical monitoring. If the Department wishes to suggest analytical monitoring to permittees, the appropriate place for such recommendations is in guidance documents, provided they clearly identify which measures required and which are only recommended.

The scope of the "suggested" monitoring program as set forth in the permit is unclear and confusing. It appears that the Department seeks at least total of six outfalls to be monitored by each permittee annually, to be representative of the "overall nature" of land use types (industrial, commercial and residential). However, it is unclear how this would apply to linear MS4 roadway systems travelling through multiple discontinuous urbanized areas and several different municipalities. Further, while the Small MS4 GP states that certain standardized procedures are "strongly recommended," the MDOT/MTA permit states, apparently completely arbitrarily, that such procedures "must be used."

More importantly, it is unclear why the Department is suggesting an analytical monitoring program at all or this specific analytic monitoring program in particular. Analytical monitoring is not required in the federal MS4 stormwater regulations, which provide simply that permittees are to evaluate program compliance, appropriateness of BMPs and progress toward achieving measurable goals. 40 CFR 122.34(g)(1). Although the note to Section 122.34(g)(1) states that the NPDES permitting authority may determine monitoring requirements in accordance with state monitoring plans appropriate to the watershed, this does not impose an analytical monitoring requirement on small MS4s.

It is worth noting that even many *industrial* stormwater dischargers are not required to perform analytical monitoring, which is reserved for those industry sectors or subsectors determine by EPA to have a high potential to discharge a pollutant at concentrations of concern. 65 Fed. Reg. 64745, 64766 (Oct. 30, 2000). These sectors include steel works, paperboard mills, water and air transportation facilities, coal mines, hazardous and solid waste landfills and a variety of manufacturing facilities (chemicals, plastics, soaps, asphalt, etc.) The remaining sectors (including Sector P – Land Transportation facilities) require only visual monitoring.

MTA may conclude that analytical monitoring is the best way to determine its progress under its stormwater plan, but it should have the freedom to do so in a manner that makes sense given its particular characteristics.

In sum, there is no apparent rationale for the analytical monitoring program suggested by the Department and it should be deleted from the permit (12, 17).

**Comment on Draft Permit:** Part IV. I. Evaluation and assessment 2. Suggested monitoring – The suggested monitoring program currently presented in the draft General Permit is very specific, detailed, and contains strong language, yet it is not a requirement of the General Permit and is only a suggested task for the Permittee to consider. This is in contrast to the remainder of the General Permit, which mostly outlines the overall intent of the General Permit requirements, relying on the individual Permittee to determine the specific activities to implement as part of the Stormwater Monitoring Plan. We suggest that this section be revised to outline what the intent and goals of a suggested monitoring program should be and then rely on the Permittee to decide on the most effective means to achieve the intent. The information currently contained in this section provides a good example for an MS4 but it may be more appropriate to put an example monitoring program in an Appendix to the permit.

**Suggested revision to permit:** Part IV. I. Evaluation and assessment 2. Suggested [remove “monitoring”]

- a. As a means to evaluate the progress towards achieving the overall goals of the General Permit, the Permittee should consider implementing a monitoring program at a selected number of stormwater outfalls. The program should be designed to monitor long-term variations in Stormwater quality over time. The monitoring program should be conducted at a selected number outfalls representative of the overall nature of the respective land use types (residential, industrial, commercial), be analyzed for a suite of parameters necessary to evaluate changes in overall water quality, and follow accepted sampling procedures for collection of stormwater samples during storm events. A sample monitoring program to consider is included in Appendix B.
- b. In lieu of conducting specific outfall monitoring, the Permittee should consider evaluating the overall water quality of the receiving



stream that the MS4 discharges. This should consist of conducting upstream and downstream water quality monitoring. Based on this data, it is possible to assess potential improvements or impacts to a receiving stream. Please note that many organizations routinely collect water quality data from numerous rivers, lakes, and streams in the State of Maine. The Permittee should utilize all applicable existing data. In addition, the Permittee should consider collecting additional water quality data, which can be used to determine the overall effectiveness of the Stormwater Management Plan. (10).

1. Required Monitoring.

The draft general permit does not require permittees to monitor their discharges. In order to assure that the objectives of the permit are met, we believe that the general permit must require a monitoring program, especially for discharges to impaired waterways. Part IV.I. of the general permit provides that “[t]he permittee must evaluate program compliance, the appropriateness of identified best management practices, and progress towards achieving identified measurable goals.” However, the permit does not require monitoring. Instead, paragraph 2 of this section lays out a suggested monitoring scheme that the permit indicates should be adopted by 2004. We believe that the permit should require permittees to implement this monitoring program immediately upon gaining coverage under the permit.

In addition, we recommend amending the suggested monitoring program to include the following requirements.

- In addition to the parameters listed, permittees should be required to monitor for metals, including lead, tin, and zinc.
- Permittees should be required to submit monitoring results on a monthly basis.
- Permittees should be required to maintain records of monitoring activity for at least five years.

By requiring permittees to monitor their discharges, the Department and the public will be in a better position to assess compliance with the permit. (9)

**Response.** To address concerns outlined above the monitoring section has been rewritten to reflect requirements addressed in 40 CFR § 122.34(g)(1). The section now reads as follows:

**I. Evaluation and assessment**

**1. Required:**

- a. The Permittee must evaluate program compliance, the appropriateness of identified best management practices, and progress towards achieving identified measurable goals.

**2. Suggested:**

- a. To evaluate the progress towards achieving the overall goals of this general permit, the Permittee should consider implementing a monitoring program at a selected number of stormwater outfalls. The program should be designed to monitor long-term variations in stormwater quality. The monitoring program should be conducted at a selected number of outfalls representative of the respective land use types (residential, industrial, commercial) and determine if the storm sewer has any illicit connections from a sanitary sewer by monitoring for bacteria.

**Comment. Part IV (D) (3) (Illicit discharge detection and elimination).** Subsection (a) of Part IV (D) (3) requires permittees to map all discharges from pipes of 18" or greater operated by the permittee. David Ladd has repeatedly stated in stakeholder meetings that smaller pipes would not be subject to mapping under this permit. However, the last sentence of this subsection (MDOT & MTA MS4 GP) states that the map must show, at a minimum, "all outfalls". We believe that this last sentence was included in this permit inadvertently and should be removed. Notably, this language does not appear in the equivalent section of the Small MS4 GP. (12, 17)

**Response.** This language has been changed to reflect the federal requirement of mapping all outfalls for all the regulated small MS4 entities. The Department tried to limit the amount of outfalls mapped during this first permit cycle however EPA commented that setting an 18" limit was unacceptable. The following is EPA's comment: Please revise the mapping requirement to be as stringent as the federal requirement for mapping "*all outfalls*". As written, the minimum conduit size of 18" is problematic.

**Comment. Part IV (D) (4) (Construction site stormwater runoff control).** The second sentence of this section states; "The program [for control of construction site stormwater runoff] must include, but not be limited to, the development and implementation of the Memorandum of Agreement between MDEP, MTA and MDOT, dated March 26, 1998, as amended. (Emphasis supplied.) This sentence is unnecessary and should be deleted.

One of the central purposes of the MOA between the Department, MTA and MDOT was to create a program addressing stormwater runoff at MTA and MDOT construction sites. The phrase "but not limited to" suggests that the MOA is insufficient, when it is not. Further the 1998 MOA has already been "developed and implemented" although the text suggests that it has not been. In any case, the permit contemplates that this MOA may be amended to address future concerns regarding stormwater runoff control at construction sites and any such amendments would be incorporated into the program. (In fact, the 1998 MOA is currently being revised to address this stormwater permit.) In sum, the Stormwater MOA is the construction stormwater runoff program.

The final sentence of this section requires the permittee to "include standard operating procedures for addressing and implementing enforcement actions." This sentence is unnecessary and should be deleted. Procedures for addressing and implementing enforcement actions are identified in the Illicit Discharge Detection and Elimination minimum control measure (Part IV (D) (3) (b)), which lists the elements of the permittees' illicit discharge detection, elimination and enforcement programs. Leaving this sentence in suggests that a separate enforcement mechanism is required for construction sites beyond what already is required under the MOA, when this is not the case. (17, 12)

**Response.** This section now reads:

**4. Construction site stormwater runoff control.** Develop, implement, and enforce a program or modify an existing program, to reduce pollutants in any stormwater runoff from construction activities that result in a land disturbance of greater than or equal to one acre. Reduction of stormwater discharges from construction activity disturbing less than one acre must be included in the program if that construction activity is part of a larger common plan of development or sale that would disturb one acre or more. The Memorandum of Agreement between MDEP, MTA and MDOT, dated March 26, 1998, as amended, (the "Stormwater MOA"), provides the mechanism for implementation of a program to reduce pollutants in any stormwater runoff from construction activities. Each permittee must include standard operating procedures for addressing and implementing enforcement actions.

**Comment. Part IV (D) (5) (Post-construction site stormwater runoff control).** The final sentence of this section requires the permittee to "include standard operating procedures for addressing and implementing enforcement actions." This requirement is confusing and does not reflect the actual federal requirement: adequate maintenance of BMPs following construction. 40 CFR Section 134(5)(ii)(C). This section should be deleted and replaced with the following, which accurately states the federal requirements for post construction controls: "Each permittee must also develop procedures to ensure adequate long-term operation and maintenance of BMPs post construction. (17)

**Response.** This last sentence has been changed to : Each permittee must develop procedures to ensure adequate long-term operation and maintenance of BMPs.

**Comment Part IV. D. 6.** Pollution prevention/good housekeeping for municipal operations. This title is inappropriate in a permit specific to MDOT and MTA since we perform no municipal operations. Since MDOT has an existing Environmental Management System for its Maintenance and Operations Bureau, no redundant O & M program will be developed. Either the existing program needs to be recognized in the permit language, or the permit needs to state that it will allow an existing program that meets the requirements. (17).

**Response** This language was primarily developed by MDOT and MTA; The municipal operation language was dropped. The Pollution prevention/good housekeeping requirements now read:

**Pollution prevention and good housekeeping in community/facility operations.** The permittee shall Develop and implement an operation and maintenance (O&M) program with the ultimate goal of preventing and/or reducing pollutant runoff from transportation facility operations within the regulated small MS4. The O&M program must include the following.

**a. Required**

- i. Each permittee shall develop a site drainage map for any site that performs vehicle maintenance or vehicle fueling. The map must depict fueling stations, vehicle/equipment maintenance, or parts, engine or under carriage cleaning areas, and vehicle storage areas including plow storage areas, and on site waste storage or disposal.

- ii. Each permittee shall develop and implement an employee training program to prevent and reduce stormwater pollution from tourist/visitor information centers or service plazas, fleet and building maintenance areas, and stormwater system maintenance.
- iii. Each permittee shall develop a description and implement measures that prevent or minimize contamination of stormwater runoff from fueling areas.
- iv. Each permittee shall maintain and label all material storage vessels for waste oil, solvents etc. to prevent contamination of stormwater.
- v. Each permittee shall develop a description as well as implement measures to prevent or minimize contamination of stormwater runoff from vehicle or equipment maintenance and from all areas used for vehicle and equipment cleaning.
- vi. Each permittee shall develop and implement inspection procedures and schedules for maintenance activities described above.
- vii. The permittee may rely on an existing program provided that it meets the requirements outlined above as determined by the Department.

**Comment – Part IV K Total Maximum Daily Load (TMDL) Allocations** Should read: Impaired waters and total maximum daily load (TMDL). If the waterbody to which a discharge drains is impaired due to non-point sources under part 303(D) of the Clean Water Act, then the discharge may not cause or contribute to a violation of a water quality standard. If the waterbody to which a discharge drains is impaired and has an EPA approved TMDL that determines that more stringent effluent limitations are needed to protect water quality and which provides adequate information to develop more specific measures to protect water quality, then the discharge must be consistent with the TMDL. If a TMDL is approved or modified by EPA subsequent to the effective date of this general permit, the Department shall notify the permittee and may require the permittee to review its plan for consistency with the TMDL and propose any necessary modification to the plan to the Department within six months of the receipt of notification concerning the TMDL. Should the Department determine that the permittee's proposed modifications are inconsistent with the TMDL, then the Department may request additional modifications from the permittee or may:

1. Issue a watershed-specific general permit for the area draining to the impaired waterbody, in accordance with all required procedures for the issuance of such permit. If such a watershed-specific general permit is issued, it replaces this general permit for purposes of activities otherwise regulated under this general permit. The watershed-specific MS4 general permit may reference parts of this general permit; or
2. Require an individual permit, in accordance with all required procedures for the issuance of such permit.(14)

**Response** this section has been changed to read

**Impaired waters and total maximum daily load (TMDL).** If the waterbody to which a discharge drains is impaired and has an EPA approved TMDL, then the discharge must be consistent with the TMDL waste load allocation and any implementation plan. If a TMDL is approved or modified by EPA subsequent to the effective date of this general permit, the Department shall notify the permittee and may require any of the following.

1. Require the permittee to review its plan for consistency with the TMDL, and propose any necessary modification to the plan to the Department within six months of the receipt of notification concerning the TMDL;
2. Issue a watershed-specific general permit for the area draining to the impaired waterbody. If such a watershed-specific general permit is issued, the Department will modify this general permit pursuant to 38 M.R.S.A. § 414-A(5) for purposes of activities otherwise regulated under this general permit. The watershed-specific MS4 general permit may reference parts of this general permit.
3. Require an individual permit.

#### **PART V -- Limitations on Coverage**

**Comment.** Part V(F)(Violation of water quality standards). This language should be revised to state that the general permit does not authorize a discharge that "will" (not "may") cause or contribute to a violation of a water quality standard. (10)

**Response.** The Department does not agree that this language should be changed.

**Comment.** Part V, page 9, footnote 10 -- should the reference be two 06-096 CMR 529 rather than 592? (3)

**Response.** Yes; it should have been 06-096 CMR 529(2)(b)(3). The MS4GP has been corrected.

#### **PART VII -- Standard Conditions**

**Comment.** Part VII(A). There is an apparent legal conflict in need of immediate resolution. One cannot get a general permit for construction activity in small watersheds of less than 10 square miles, lake watersheds, or high quality streams. What will be the course of action if emergency legislation does not occur? (3)

Footnote 11 notes that Maine law currently does not allow the discharge of storm water to Class A waters or to watersheds of less than 10 square miles, and that the Department is "considering" proposed emergency legislation to allow such discharges under appropriate conditions. This language should be strengthened to demonstrate the Department will fix this problems. (10)

The Department should submit legislation to amend Class A criteria to allow for stormwater. Restrictions 3 and 4 should be rewritten so that the restriction only applies if the discharge will cause or contribute to a violation of the water quality classification. (14)

**Comment. Standard Condition E.** The Department should seek actively (not merely "consider") emergency legislation amending Chapter 529 to allow discharges otherwise authorized by the MS4 permits to Class A waters as well as to watersheds of less than 10 square miles. (17)

**Response.** The issue concerns watersheds of less than 10 square miles, and discharges to Class A waters. Stormwater discharges in lake watersheds (to lakes) are allowed as provided in 38 M.R.S.A. 465-A(1)(C)(first sentence).

Reference: <http://janus.state.me.us/legis/statutes/38/title38sec465-A.html>

The Department has proposed and is supporting emergency amendments to the two statutory prohibitions that would allow stormwater discharges under appropriate conditions. The proposed amendments from the Department will be considered by the Legislature this session. The language in the general permit does not reflect the outcome of the proposed legislation. However, the text in the footnote has been changed as follows:

"The Department ~~considering~~ **proposed** emergency legislation to allow certain stormwater discharges to Class A waters and to watersheds of less than 10 square miles."

The Department may not authorize a discharge that is prohibited by statute. Therefore, the Department may not revise Restrictions 3 and 4 so that they conflict with statutory restrictions.

**Comment.** This permit contains some apparent contradictions in Part VI, which concerns prohibitions on discharges to GPA, AA, A and SA waters. Although DEP rules do not allow discharges to these GPA, AA, and SA waters and only allow discharges of water equivalent or cleaner than receiving water quality to A waters, this permit clearly shows DEP's intention to further legitimize stormwater discharges to the highest quality waters in the state. We urge DEP to justify this decision and to provide some estimation of what its impacts will be. Will it, for example, provide a precedent to allow other discharges in the state's highest quality waters? (11)

**Response.** The waste discharge rules in this area have not been updated to reflect changes in statute made since the rules were last updated. Where there is an inconsistency, the statutory provisions control. Stormwater discharges are allowed under certain conditions to GPA and SA waters at this time. See 38 MRSA §§ 465-A(1)(C), 38 MRSA 465-B(1)(C).

It is correct that the Department is supporting legislation to allow stormwater discharges to Class A waters if certain standards are met. This change will be considered before the Legislature, and is outside the scope of this permit issuance.

**Comment.** This permit will do little or nothing to address post-construction impacts of new or existing development on rivers, streams and many other waterbodies, and in many cases, existing development is the most important source of water quality problems. We strongly urge DEP to address post-construction and existing development stormwater impacts quickly and effectively. (11)

**Response.** The Department agrees that post-construction impacts must be addressed in Maine, and will be working on this issue in the coming year.

**Comment. Standard Condition A.** The last sentence of this standard condition requires submission of a check with each NOI. However, the initial amount of \$108 is not due until 2004 with the first annual report. Further, the MS4 permits provide for a two-part NOI. This sentence should be deleted.

**Response.** This sentence has been deleted.

**Comment.** Part VII (B) should be rewritten to require that pollutants removed or resulting from treatment of stormwater be disposed of in a manner consistent with State law, instead of requiring disposal "in a manner approved by the Department." (14)

**Response.** Part VII consists of Standard Conditions that are required by rule, including the requirement that removed pollutants be disposed of in a manner approved by the Department (see 06-096 CMR 529.3(h)). No change has been made since the language is the same as the rule.

**Comment.** Part VII (C) -- Monitoring is expensive for the property owner and time consuming for the Department to review. This section should identify what conditions will trigger the monitoring requirement. At a minimum, it is suggested that the monitoring requirement be limited to projects requiring an individual permit. (14)

**Response.** The Standard Condition for monitoring has been deleted from the MS4 general permits.

**Comment. Standard Conditions F and G.** These conditions are not applicable to any of the MS4 general permits, since the permits do not require monitoring. These conditions should be deleted.

**Response.** This condition has been deleted from the permit.

**Comment. Standard Condition I (2).** The applicability of Chapter 523, Section 3 to the MTA is not apparent. This provision should be deleted.

**Response.** This provision has been deleted from the permit.

**Comment. Standard Condition K.** The last three words of this standard condition ("or other information") appear to have been added in error and should be deleted. As written, this standard condition goes beyond the requirements of Chapter 523, which says only that permittees must furnish information necessary for the Department to determine compliance with the permit. (17)

**Response.** The last three words of this standard condition ("or other information") have been deleted from the permit.

**Comment.** Under IVD3b authorized non-stormwater discharges include "fire hydrant flushing if released to a vegetated buffer area." In the majority of situations it would be possible to comply with those provisions, particularly if the activity is a planned event that can be scheduled during wet weather and/or high flows, or if the activity is proximate to a vegetated buffer. However there will be many operations and maintenance situations that the proposed provisions would not accommodate.

Included in this category would be new water mains that are disinfected and flushed following their installation, ruptured water mains that have been repaired and that need to be disinfected and flushed before putting back into service and the opening of multiple hydrants (as part of flow testing procedures) that is periodically required by the Insurance Services Offices. Distribution system flushing, a maintenance procedure that is necessary to maintain water quality, can usually be accomplished under the scenarios detailed in the proposed permits, but that is not always the case. There are other situations that may require the release of water from the distribution system. Many of these activities can often, but not always, be accomplished during a wet weather event, high stream flows, or to a vegetated buffer.

It is extremely important that our water system operators retain the ability and flexibility to operate the public water systems in such a way as to maintain water quality and protect the public health. In most situations it will be possible to do that while incorporating the principles and

procedures in the proposed permits. It may also be possible to chemically neutralize the residual disinfectant in the system water as it is being discharged to the environment; however certain neutralization procedures may be more acceptable than others. We would welcome the opportunity to work collaboratively with department staff in developing procedures that best meet the objectives of all concerned.

It is our understanding that the federal requirements allow for discharges from potable water sources. We are requesting that the permits be modified to reflect the federal language. That change to the proposed permit, coupled with efforts of DEP staff and system operators to develop operating procedures that address the Department's concerns, while allowing the flexibility necessary to maintain drinking water quality is, in our opinion, the appropriate course of action (13, 18).

**Response.** The Department has concerns about pollutants in these discharges. However, it is recognized that the establishment of appropriate operating procedures and limitations is beyond the scope of this particular general permit. Therefore, the Department has modified the text of the MS4GP to reflect the text in the recently expired federal Construction General Permit, in relation to hydrant flushings and potable water sources, which authorized these discharges. These discharges will be authorized under the MS4GP until the Department issues a general permit specifically for these discharges.

The following amendment has been made: "

- hydrant flushing and fire fighting activity runoff,
- water line flushing and discharges from potable water sources, individual residential car washing
- dechlorinated swimming pool discharges

**Comment.** Neither the Department nor Maine business has the resources to engage in duplicative activities. There are numerous State regulatory programs that review stormwater and the requirements are not uniform. Maine business should only have to complete one submission to address stormwater controls. (14)

**Response.** The Department made significant efforts to combine all stormwater requirements for organized areas into Chapter 500, and to provide a single set of standards and submissions for both programs. However, representatives of business interests in the stakeholder process objected that they needed more time to examine and discuss the proposal, and instead urged the Department to develop and issue a separate construction general permit, which entailed separate filing requirements and standards, to authorize discharges for the short term.

It should be noted that standards under state programs such as the Stormwater Management Law, Site Law, and NRPA are generally consistent. Certain projects because of their size, type or location need to meet additional standards. This variation is appropriate.

## GENERAL COMMENTS

**Comment.** After reading the definitions associated with the MS4 permit, we would like to see further clarification on the term "small MS4." Our concern is that this definition could be interpreted to include any municipality, regardless of whether the DEP has designated is as a MS4 community or not. (16)



**Response. Small MS4.** “Small MS4” means any MS4 that is not already covered by the Phase I MS4 stormwater program including municipally owned or operated storm sewer systems, State or Federally-owned systems, such as colleges, universities, prisons, MDOT and MTA road systems and facilities, and military bases and facilities. A Small MS4 is not necessarily a regulated storm sewer system. To be regulated it would have to be located within a UA and not receive a waiver.

**Regulated Small MS4.** “Regulated Small MS4” means any Small MS4 authorized by this general permit including all those located partially or entirely within an Urbanized Area (UA) and those additional Small MS4s located outside a UA which as of the issuance of this general permit, have been designated by the Department as Regulated Small MS4s.

**Comment.** Attached, please find the list of specifically identified mandates associated with the requirements of the Construction General Permit and the MS4 permit.

#### Municipal Separate Storm Sewer System Permit

##### I. Submissions and Notices

- Submit Part A of the Notice of Intent to DEP

**a. Identify the names of the receiving streams, watersheds, or waterbodies to which the MS4 discharges.**

Part B of the Notice of Intent to DEP

- a. Provide information on the Six Minimum Control Measures
  - (i) Measurable goals and BMPs
  - (ii) Timeline for each goal

##### II. Requirements

- Develop a Stormwater program management plan
  - a. This plan must be implemented and enforced by the municipality.

- Annual fee \$108

- Minimum Control Measures:

A. Public education and outreach

- (i) Educate the community
- (ii) Target and educate industrial, commercial, institutional, governmental and residential activities.

- (iii) Use a multimedia approach and provide this information in more than one venue

B. Public Involvement/ Participation

- (i) Local public notices

C. Illicit discharge detection and

elimination

Develop, implement, and enforce a program to detect and eliminate illicit discharges and non-stormwater discharges

Map all storm sewer systems showing all Stormwater discharges from a pipe or conduit 18 inches or greater

Include the name of the surface waterbody or wetland to which the runoff discharges, or trace it to the outfall to which it eventually discharges.  
Adopt and enforce an ordinance regulating non-stormwater discharges into the storm sewer system  
Develop and implement a plan to detect and address non-stormwater discharges, including illicit discharges and illegal dumping.

D. Construction site Stormwater runoff control

- (i) Develop, implement, and enforce a program to reduce pollutants in any Stormwater runoff to the MS4 from construction.
- (ii) Adopt an ordinance to require erosion and sedimentation controls and non-compliance measures
- (iii) Develop a notice procedure for developers
- (iv) Develop or adopt Erosion and sedimentation control BMPs
- (v) Develop a method to require construction site operators to control waste at the site.
- (vi) Must receive and consider information from the public comments
- (vii) Must inspect the site and enforce for control measures

E. Post-construction Stormwater management in new development and redevelopment

- (i) Develop, implement and enforce a program to address Stormwater run off from new development and redevelopment projects. Program must ensure that the controls are in place and will prevent/minimize water quality impacts.
- (ii) Develop and implement strategies that include a combination of BMPs
- (iii) Adopt an ordinance to address post-construction runoff
- (iv) Ensure adequate long-term operation and maintenance of the BMPs

F. Pollution prevention/good housekeeping for municipal operations

- (i) Develop and implement an operation and maintenance program that includes training for municipal employees and contractors
- (ii) Develop and implement a program to sweep all publicly accepted paved streets and parking lots annually.
- (iii) Develop and implement a program to evaluate (and if necessary) clean catch basins and other structures.
- (iv) Develop and implement a program to evaluate (and if necessary) prioritize for

repairing, retrofitting or upgrading  
conveyances, etc.

- Must amend plans to keep them current
- Must evaluate the program for compliance.
- Must keep records for three years
- Sampling and test procedures (when required) (16).

**Response.** The Department received delegation to administer the Stormwater Phase II program from EPA in January 2001 and the Department has not sought to exceed the federal minimum requirements for this program. The MS4 GP is not a regulation and does not create a state mandate. State law already exists that makes it unlawful for an entity to discharge pollutants to waters of the State without first obtaining a license from the Board of Environmental Protection (Title 38 MRSA Section 413). When a municipality chooses to conduct an activity that triggers the requirements of State law, it must comply with those requirements. In the case of regulated stormwater discharges, the requirements include obtaining a license for the discharge. The MS4 GPs may be used in lieu of obtaining individual permits.

**Comment.** The draft MS4 GPs includes “suggested” activities along with required activities. These suggestions, if appropriate at all, belong in guidance documents. (12, 17)

**Response.** Stakeholders that crafted the permit language determined that suggested activities were an important part of the permit adding clarification to the minimum control measures. Suggested activities will remain in the MS4 GPs so as to provide a point of easy reference. The permittee will not have to shift between documents to obtain clarification. A guidance document is currently being developed for the MS4 GPs. This document will further elaborate on how to protect Maine’s water resources and comply with the MS4 GPs.

**Comment.** It appears that the proposed reporting requirements are stricter than those required by EPA. (1)

**Response.** An annual report is required. The report includes the following seven (6) requirements

1. The annual fee of \$108.00;
2. The current copy of the Plan (including a detailed implementation schedule), status of compliance with permit conditions, an assessment of the appropriateness of identified best management practices and progress towards achieving identified measurable goals for each of the Minimum Control Measures;
3. Results of information collected and analyzed, including monitoring data, if any, during the reporting period;
4. A summary of the stormwater activities the permittee intends to undertake pursuant to its Plan during the next reporting cycle; and
5. A change in any identified measurable goals that apply to the program elements.
6. A summary describing the activities, progress, and accomplishments for each of the minimum control measures #1 through #6 (including such items as the number and nature

of enforcement actions, inspections, public involvement activities, detected illicit discharges, detected illicit connections, illicit discharges that were eliminated, and public education ventures.

The Department suggests that the report also include estimated annual expenditures for permit compliance for the reporting period and projected budget for the following year.

The Department has assessed a fee to review these reports; EPA does not mention a fee in its requirements however the Department finds it is necessary to assess a fee to cover its review costs. Requirement #2 stipulates that a current copy of the plan and implementation schedule must be submitted. EPA does not require this, however this and all of requirement # 6 were added by the Department to better evaluate program effectiveness and compliance, and to further assess the Plan's success or failures of implementing six minimum control which are designed to reduce the discharge of pollutants from the Permitted Facility to the maximum extent practicable, and to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act.

The Department is suggesting that regulated small MS4 entities submit estimated annual expenditures and a projected budget for the following year. This is in response to ME Rural Water Association's (MRWA) comment to better provide information on the economic impact that these permits would have on dischargers.

**Comment.** We could not determine the criteria DEP used for designating Regulated Small MS4s. (1)

**Response.** Under Section 123.35(b) the Department must establish designation criteria to evaluate stormwater discharges to be regulated under Sections 122.32-122.36. The Department must develop a process, as well as criteria, to designate small MS4s. At this time, the Department has not developed designation criteria or designated any additional small MS4s outside the UA. Developing this criteria will be done with public input.

**Comment.** We found no definition of designation. (1)

**Response.** The Department did not include a definition of designation because at this time no additional MS4s have been designated.

**Comment.** We could not determine how or under what criteria DEP would make additions to the Regulated Small MS4s. (1)

**Response.** At this time, the Department has not proposed to make additional designations or develop criteria in this matter.

**Comment.** We could not determine whether some or all of the Small MS4s would in fact be required to get a discharge permits. (1)

**Response.** Only the Small MS4s within a UA that have not received a waiver from the Department will be regulated. A list of the regulated municipalities is listed in Appendix A of the MS4GPs.

**Comment.** We could not determine the economic impact that these permits would have on dischargers. (1)

**Response.** The Department has not calculated the costs or economic impacts to the discharger. The EPA has done a cost benefit analysis see page 68791 of Federal Register/Vol. 64, No. 235/Wednesday, December 8, 1999/Rules and Regulations. However, the Department has asked but not required regulated entities to submit estimated costs for this program in their annual report.

**Comment.** We found the definition of Small MS4s to be unclear.(1)

**Response.** This is a federal definition, see page 68749 of Federal Register/Vol. 64, No. 235/Wednesday, December 8, 1999/Rules and Regulations.

**Comment.** The January 12, 2001 delegation of the NPDES program to the State did not include Indian country. This lack of permitting authority could potentially limit construction stormwater discharge permitting within that territory. Will the apparent inability for Maine to issue discharge permits within this region be resolved by the March 10, 2003 date? (3)

**Response.** No. The MS4GP provides that the general permit "applies in those parts of the State of Maine for which the Department has received delegated authority under the federal NPDES program."

**Comment.** Rationale for Issuing the Permit.

In order to maximize the effectiveness of this permitting program, it is important for the Department to clearly articulate the rationale for promulgating this general permit. Although the introductory section of the fact sheet includes information on the regulatory background for the issuance of the permit, there is nothing in the permit or in the fact sheet that spells out the environmental and economic reasons for controlling these types of discharges.

The permit should include specific findings explaining how the discharge of urban stormwater reduces water quality and results in other environmental degradation. For example, the permit might elaborate on the following points:

Urban stormwater runoff is one of the leading threats to the public health and the environment. In fact, stormwater runoff rivals industrial and municipal discharges as a pollution source in the United States.

When it rains or snows, the water that runs off of city streets, parking lots, and construction sites can wash sediment, oil, grease, toxics, pathogens, and other pollutants into nearby storm drains. Once this pollution enters the sewer system, it is discharged without treatment into local streams and waterways.

The discharge of these pollutants fills in waterways with sediment, scours smaller stream channels and deposits sediment that destroys fish habitat.

According to EPA, the discharge of sediment has been identified nationwide as the single largest cause of impaired water quality in rivers and the third largest cause of impaired water quality in lakes.

The discharge of untreated stormwater can include harmful pollutants such as nutrients, pathogens, metals, and toxic contaminants that negatively impact rivers, streams, and marine environments and result in destruction of fish and shellfish habitat, beach closures, impaired water quality, reduced dissolved oxygen, contamination of wildlife, and threats to human health. The problems caused by this polluted runoff ultimately results in substantial financial and societal costs stemming from declines in commercial fisheries and tourism. (9)

**Response.** The rationale or why behind the permit is an important feature for the regulated community to be aware of. However, Department staff has concluded that it is more appropriate to incorporate this information in a companion guidance document.

**Comment.** If there is a discharge to an MS4 in the UA either less than or greater than one acre and the discharge flows out of the UA so that the discharge point is not in the UA is this regulated under the MS4 program?

**Response.** The regulated small MS4s must address discharges to its MS4 if they occur in the UA. If the disturbance from where the discharge originates is less than one acre the regulated small MS4 entity should advise the discharger of the Erosion and Sedimentation Control Law which stipulates implementation of erosion and sedimentation controls to prevent unreasonable erosion and sedimentation. If there is a greater than one acre disturbance within the UA which causes a discharge, the regulated small MS4 must inform the discharger to acquire coverage pursuant to the MCGP. DEP as the permitting authority encourages regulated entities to regulate discharges outside the UA however, they are not required to do so under this program.

**Comment.** The application of the new laws are highly discriminatory attacking only federal UAs that are contributory to a 50,000 population which comprise US DOT Metropolitan Planning Organizations (MPO), creation dates back to the early 80s.

This includes:

KACTS Kittery Area Comprehensive Transportation System which is part of the NH Portsmouth/Durham/Dover UZA.

PACTS Portland Area Comprehensive Transportation

LACTS Lewiston Area Comprehensive Transportation

BACTS Bangor Area Comprehensive Transportation

These MPO's were created to investigate, evaluate, plan, engineer, and implement "Transportation Improvement Programs" (TIP) that could involve transportation by boat, plane, train, automobile, bike, pedestrian or other means. The 50,000 population base triggered commuter transit use studies and implementations as well as possible improvements or constructions of traditional facilities i.e. highway systems.

None of this was ever meant to make us a select first attack group by EPA or DEP. (7).

**Response.** Criteria for determining regulated small MS4s was established by Federal Rule not by MEDEP.

**Comment.** Under CFR Title 23, Volume 1, Part 450 Subpart C, Sec. 450.306 Metropolitan planning organization: Designations and redesignation provides a means for a community or communities a way of seceding from the federation. The redesignation of the KACTS would absolve our group of the MSW designation and in the long run improve our ability to individually get highway projects funded by the Maine DOT. As it stands now we get "x" of same dollars per biennium versus a whole amount for a project. (7).

**Response.** USEPA has provided nation-wide designation to all MS4s within UAs. The Maine municipalities adjacent to New Hampshire are still part of a UA and require authorization to discharge as regulated small MS4s.

**Comment.** The community selection criteria for inclusion into the Stormwater Management Program, if being done by population and density, should apply fairly to all communities in Maine. What happens to the others as Standish (pop. 9,285), Old Orchard Beach (pop. 8,856), Augusta (pop. 18,560), Brunswick (pop. 21,172), Kennebunk (pop. 10,476), York (pop. 12,854), Sanford (pop. 20,806), and Presque Isle (pop. 9,511), etc., etc. (7).

**Response.** Only communities/MS4s located within a UA are required to develop, implement and enforce a stormwater program. A list of these MS4s is included in Appendix A of each MS4 general permit.

**Comment.** The draft cites regulatory federal agencies, DEP divisions, and local enforcement most of whom are able to appropriate an existing law or regulation against a pollutant action. It seems to me that these new regulations and your position are a redundancy to already existing State and Federal positions.(7)

**Response.** The new requirements, especially the development and implementation of the Plan complement existing laws and regulations, providing better tools to protect and enhance water quality.

**Comment.** One pollutant source mentioned was business parking lot fines and oil drainage going into the "Waters of the State". Would it be advisable "now" to institute a new local tax on our resident and businesses called a "Contributory Storm Water Management Fee" which would assess them on a cfs generated basis on some other method? (7).

**Response.** Each municipality may choose a method to generate revenue for funding their stormwater management program.

**Comment.** In the title "Municipal Separate Storm Sewer Systems" the word "sewer" connotes, to most people, human wastes. Using the word "sewer" obviously makes people think of something nasty and exaggerates and emphasizes a condition which may not exist.(7).

**Response.** Municipal Separate Storm Sewer System is a federal term, and means conveyances for stormwater, including, but not limited to, roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, human-made channels or storm drains (other than publicly owned treatment works and combined sewers) owned or operated by any municipality, sewer or sewage district, fire district, State agency Federal agency or other public entity and discharging directly to

surface waters of the State. Polluted stormwater runoff has been identified as one of the leading causes of water pollution in the State.

**Comment.** We are concerned by the complete lack of reference to the Endangered Species Act in the draft general permit. EPA's draft permit contains extensive references to the endangered species act, and even has a complete appendix detailing steps to take to ensure that a particular project will not jeopardize endangered species. The Department is urged to rectify this omission. Stormwater discharges from construction activities must not be allowed to threaten endangered species, and DEP must develop a process to ensure this. (11)

In issuing this general permit, the Department must comply with all of its consultation requirements with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. In addition, general permits should not be used under any circumstances to authorize discharges to waters known to support populations of threatened or endangered species. Individual permits should be applied for and considered where a discharge is into a waterbody that protects endangered species. (9)

**Response.** The EPA is required to ensure that any action authorized by EPA is not likely to jeopardize the continued existence of any endangered or threatened species or adversely affect its critical habitat. See 40 CFR 122.49. However, not all NPDES requirements applicable to EPA's permitting program apply to state delegated programs. Title 40 CFR 123.25 lists the provisions which state programs must have authority to implement. Title 40 CFR 122.49 is not included in this list.

The Department included a Standard Condition that prohibits a State agency or municipal government from issuing a license, funding or permitting projects that significantly alter habitat of any species designated as threatened or endangered, or violated protection guidelines, with a determination from IF&W. See 12 MRSA § 7755-A.

**Comment.** We wanted to assure that you are aware of the Ninth Circuit decision with respect to the Phase II Rule. In *Environmental Defense Center, Inc. v. U.S. E.P.A.*, No. 00-70014 (9<sup>th</sup> Cir. Jan. 14, 2003), the Ninth Circuit held that the EPA's failure under the Phase II scheme to require review of notices of intent ("NOIs"), which the court found to be the functional equivalent of permits under the Phase II General Permit option, and to make the NOIs available to the public or subject to public hearings violate the Clean Water Act ("CWA"). The court remanded these aspects of the MS4 program to give EPA an opportunity to correct these deficiencies.

Given the similarities between the EPA Phase II program and the Maine Department of Environmental Protection's (the "Department" or "DEP") draft permit for the discharge of stormwater from small construction sites, we believe that the Department ought to carefully review the Ninth Circuit's decision and its draft permit to determine whether or not Maine's permitting scheme is similarly flawed. For example, the DEP may wish to revisit the following features of the permit in light of the recent court decision. First, under the permit each permittee must submit an NOI, but there are no procedures in place to notify the public of the filing of NOIs. Second, there is no opportunity built into the permitting process for the public to comment on ESC plans, which contain the substantive information about how the permittee will control the discharge of stormwater from the site. Third, according to the permit, the DEP is not planning to review ESC plans for construction activities that do not occur in impaired watersheds.

In order to comply with the CWA, DEP should consider adopting the following measures: (1) send notice of the filing of NOIs to the usual NPDES notice list; (2) provide the public with a



meaningful opportunity to review and comment on NOIs and ESC plans; and (3) review all ESC plans internally for compliance with the permit. (9)

**Response.** The Department will follow legal developments in this area with interest, and comply with any applicable changes to the NPDES requirements.

**Comment.** The general permit states that: “This general permit does not authorize a discharge that may cause or contribute to a violation of water quality standards.” Part I.C.5. Accordingly, the proposed permit must require existing dischargers to make an affirmative demonstration that the discharge will not cause or contribute to a violation of water quality standards. For new or expanding discharges into already impaired waters, the permittee must be able to make an affirmative demonstration that they will not cause or contribute to existing violations. This required demonstration must specifically identify measures and BMPs that will collectively control the discharge of the pollutants of concern. (9)

**Response.** This program is BMP based and dischargers will be tasked with reducing the pollutants in stormwater to the maximum extent practicable to all waters of the State.

**Comment.** The draft general permit does not require permittees to monitor their discharges. In order to assure that the objectives of the permit are met, we believe that the general permit must require a monitoring program, especially for discharges to impaired waterways. Part IV.I. of the general permit provides that “[t]he permittee must evaluate program compliance, the appropriateness of identified best management practices, and progress towards achieving identified measurable goals.” However, the permit does not require monitoring. Instead, paragraph 2 of this section lays out a suggested monitoring scheme that the permit indicates should be adopted by 2004. We believe that the permit should require permittees to implement this monitoring program immediately upon gaining coverage under the permit.

In addition, we recommend amending the suggested monitoring program to include the following requirements.

- In addition to the parameters listed, permittees should be required to monitor for metals, including lead, tin, and zinc.
- Permittees should be required to submit monitoring results on a monthly basis.
- Permittees should be required to maintain records of monitoring activity for at least five years.

By requiring permittees to monitor their discharges, the Department and the public will be in a better position to assess compliance with the permit.(9)

**Response.** Monitoring is not required under the Phase II Rule and so it was not mandated in this permit. The Department has the discretion to require monitoring, as provided in the standard conditions, as provided in the standard conditions, as well as the discretion to require an individual permit, on a project by project basis.

**Comment.** In addition to the reporting and record keeping requirements detailed in Part IV.J., the Department should publish on an annual basis a detailed description of each instance of non-compliance, including to, but not limited to the location of the violation, the identity of the owner

and operator, the nature and extent of the non-compliance, the actions taken to resolve the non-compliance, the results of those actions, and a statement as to whether the non-compliance has stopped or is continuing (and, if continuing, the reasons therefore and the permittee's plan to achieve compliance).(9)

**Response.** The Department will work with each regulated entity to ensure compliance with the Phase II Rule. If a regulated small MS4 fails to comply with the Phase II Rule the Department will take enforcement actions to correct the problem, protect the waters of the State and bring the regulated small MS4 back into compliance. Enforcement cases will be part of the public record and will address many of the concerns mentioned in the comment above.

#### LIST OF COMMENT DOCUMENTS RECEIVED

#	Name	Company or Representation
1	Levy, Steven	Maine Rural Water Association
2	Milligan, Tom (#1)	City of Biddeford
3	Coffin, Wendy and Paul Porada	Woodward & Curran
4	Brandt, David	Dept. of Defense, Veterans and Emergency Management, Military Bureau
5	Murphy, Thelma	EPA
6	McMahon, Jim	Town of Berwick
7	Rossiter, Richard	Kittery
8	StPeter, Dennis	Civil Engineering Services Inc.
9	DeScherer, Christopher K.	Conservation Law Foundation
10	Patten, Robert	Environmental Engineering & Remediation Inc.
11	Bennett, Nick	Natural Resources Council of Maine
12	Newman, Sharon	Maine Turnpike Authority
13	McNelly, Jeffrey	Maine Water Utilities Association
14	Edelstein, Jeff.	Maine Turnpike Authority
15	Earley, Kathy	City of Portland, Dept. of Public Works
16	Kirsten Hebert	Maine Municipal Association
17	Christine Olson	Maine Department of Transportation
18	Rogalski, Wayne	Bangor Water District